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105TH CONGRESS *2d Session*	SENATE	REPORT 105–183

CONSUMER ANTI-SLAMMING ACT

REPORT

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1618

MAY 5, 1998.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

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CONSUMER ANTI-SLAMMING ACT

MAY 5, 1998.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1618]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1618), a Bill To amend the Communications Act of 1934 to improve the protection of consumers against "slamming" by telecommunications carriers, and for other purposes, reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of the bill is to provide additional protection for consumers against the unauthorized changing of their provider of telephone exchange service or telephone toll service.

BACKGROUND AND NEEDS

"Slamming" is the unauthorized changing of a consumer's provider of telephone exchange service or telephone toll service. It is a problem that affects thousands of consumers across the country, and one that is expected to grow if stringent anti-slamming measures are not developed.

Consumers who are slammed often receive lower-quality service or are charged higher rates by their new carrier. Sometimes consumers are not even aware that they have been slammed until after they see their bills. Once they discover the problem, they often have no choice but to go through the aggravation of getting their service switched back to their original carrier and having their bills adjusted. During this process, many consumers find it difficult to secure compensation for any additional damages they may have suffered as a result of the slamming.

There are many ways in which a carrier can slam a consumer. Some long distance companies misrepresent themselves by claiming that they are calling on behalf of another company or are working with the local telephone company to consolidate local and long distance phone bills. Other companies use false third-party verification or negative option packages, with deceptive telemarketing practices, as a way to obtain authorization for carrier changes. Still others just claim falsely that they received the consumer's verbal consent for the switch.

The Federal Communications Commission (FCC) first established safeguards to deter slamming when equal access was implemented in 1985. Equal access allowed consumers to select their preferred provider of long distance service and required local telephone companies to program their network switches to automatically route long distance calls from consumers' homes or businesses to their carrier of choice. The FCC's initial slamming rules required long distance carriers to take steps to obtain signed Letters of Agency (LOA) from consumers before initiating a carrier change.

As the long distance market grew more competitive, additional slamming rules were needed. In 1992, in response to a petition by AT&T and MCI, the Commission adopted procedures for verifying carrier-initiated telemarketing calls. Notwithstanding this verification requirement, slamming problems persisted. Responding to continuing consumer complaints, the Commission instituted a rulemaking and adopted rules to deter misleading LOAs in 1995.

Despite these measures, aggressive long distance telemarketers continue to mislead consumers by, for example, obtaining a consumer's signature to accept a check, card or promotional item and then using the signature to have their long distance service changed.

In its Fall 1996 Common Carrier Scorecard, the FCC said that more than one-third of the written complaints submitted to the FCC's Consumer Protection Branch in 1995 related to slamming. This problem is continuing to grow at a troubling rate. Slamming complaints are the fastest-growing category of complaints reported to the FCC, having more than tripled in number since 1994. In 1997, 44,000 consumers wrote slamming complaints to the FCC. This is a 175 percent increase from the 16,000 complaints received in 1996.

The scope of the slamming problem is even broader than indicated by the number of complaints filed at the FCC. According to the National Association of State Utility Consumer Advocates, slamming is now the largest single consumer complaint received by many state consumer advocates, and as many as one million consumers are switched annually to a different provider without their knowledge or consent.

With the enactment of the Telecommunications Act of 1996, which added a new section 258 to the Communications Act of 1934, the FCC is again reexamining its rules. Section 258 includes provisions to reduce slamming. Among other things, it provides that no telecommunications carrier shall submit or execute a change in a consumer's selection of a provider of telephone exchange service or telephone toll service except in accordance with the FCC's verification procedures.

The law also provides that any telecommunications carrier that violates the FCC's verification procedures and that collects charges for telephone exchange service or telephone toll service from a consumer shall be liable to the consumer's original preferred carrier for an amount equal to all charges paid by the consumer to the unauthorized carrier. The FCC is now in the process of adopting rules to implement these provisions.

Notwithstanding this succession of regulatory and statutory attempts to deter slamming, it remains a serious and growing problem. One reason is that it is often difficult to prove that a provider switched a consumer to its service without the consumer's consent. Without this evidence, slammers often go unpunished. Another reason is that the majority of consumers who have been fraudulently denied the services of their chosen carrier do not turn to the FCC for assistance because the Commission's processes are confusing and the available sanctions inadequate.

S. 1618 is a bill designed to provide more effective ways to stop slamming. This legislation establishes stringent anti-slamming safeguards, as well as additional remedies and fines, that will discourage carriers from engaging in this practice. It prescribes definitive procedures for companies to follow in making carrier changes, provides alternative ways for consumers to obtain redress for having been slammed, and gives federal and nonfederal authorities the power to impose tough sanctions, including high fines and compensatory and punitive damages. These measures, in addition to those that the FCC and/or the states may develop, will ensure that consumers are afforded adequate protection against slamming.

LEGISLATIVE HISTORY

On August 12, 1997, the Subcommittee on Communications held a hearing on slamming in Billings, Montana. Witnesses at the hearing included federal and state government representatives, federal and state trade associations, industry representatives, and consumers whose long distance carriers were switched without consent.

On October 14, 1997, the Subcommittee on Communications held a hearing on slamming in Denver, Colorado. Witnesses at this hearing included federal and state government representatives, industry representatives, a Colorado telecommunications trade association, and consumers whose long distance carriers were switched without consent.

Senator John McCain, the Chairman of the Committee on Commerce, Science, and Transportation, introduced S. 1618 on February 9, 1998. The bill's cosponsors are Senators Hollings, Frist, Snowe, Reed, Bryan, Dorgan, Johnson, Harkin, Kerry, Inouye, Abraham, Baucus, Smith, Gorton, Lott, and Bob Smith.

Other slamming bills introduced in the 105th Congress are: H.R. 2112, introduced by Representative Franks on July 8, 1997; H.R. 2120, introduced by Representative DeFazio on July 9, 1997; H.R. 3050, introduced by Representative Dingell on September 13, 1997; S. 1051, introduced by Senator Campbell on July 22, 1997; S. 1137, introduced by Senator Durbin on July 31, 1997; S. 1410, introduced by Senator Reed on September 7, 1997; and S. 1740, introduced by Senator Collins on March 10, 1998.

MARCH 12, 1998 EXECUTIVE SESSION

In open executive session on March 12, 1998, after adopting amendments offered by the Chairman, the Committee, by a voice vote, ordered S. 1618 reported.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 7, 1998.

Hon. JOHN MCCAIN,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1618, a bill to amend the Communications Act of 1934 to improve the protection of consumers against "slamming" by telecommunications carriers, and for other purposes.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Kim Cawley (for federal costs), Alyssa Trzeszkowski (for revenues), and Jean Wooster (for the private-sector impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 1618—A bill to amend the Communications Act of 1934 to improve the protection of consumers against "slamming" by telecommunications carriers, and for other purposes

Summary: S. 1618 would amend the Communications Act of 1934 to prohibit telecommunications carriers or service resellers from submitting or executing changes in a subscriber's selection of a provider of telephone exchange or toll service except in accordance with procedures prescribed by the Federal Communications Commission (FCC). Under this bill, consumers would have the right to file a complaint with the FCC if concerns regarding an unauthorized change in providers cannot be resolved by the carrier or service reseller within 120 days. The commission would be required to follow simplified procedures in reviewing these cases, and to issue an order resolving the complaint within 150 days. If violations are identified, the commission would be authorized to award damages to the customer of $500 or more and to impose additional penalties on carriers or service resellers. The bill also would direct the FCC to issue various rules and reports related to industry practices and implementation of the bill.

CBO estimates that the net budgetary impact of implementing this bill would not be significant. Because the bill would establish new penalties that could affect receipts, pay-as-you-go procedures would apply. S. 1618 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would not affect the budgets of state, local, or tribal governments. S. 1618 would impose new private-sector mandates, but CBO estimates the costs would fall below the statutory threshold.

Estimated cost to the Federal Government: CBO estimates that the FCC would spend about $6 million annually to implement this bill, assuming appropriation of the necessary amounts. Because the commission is authorized under current law to collect fees from the telecommunications industry sufficient to offset the cost of its enforcement program. CBO assumes that these additional costs would be offset by an increase in collections credited to annual appropriations for the FCC. Hence, we estimate that the net effect on discretionary spending would be negligible.

The FCC's gross administrative costs would increase primarily because it would be required to issue a formal order for each complaint. In 1997, the agency received over 20,000 such complaints, most of which were resolved without issuing orders. CBO expects that the FCC's caseload would decline as a result of the bill's incentives for industry to resolve complaints voluntarily, but that its total workload would grow because of the time involved in issuing an order for each case. Based on information provided by the FCC, we estimate that issuing orders for 12,000 cases would cost an additional $6 million per year and that preparing the regulations and reports required by the bill would cost less than $500,000.

The bill also would amend the Communications Act of 1934 to impose penalties on those who make unauthorized changes in a subscriber's provider of telephone services. CBO estimates that this provision would have a negligible effect on revenues.

Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. Enacting S. 1618 could affect receipts because the bill would authorize civil penalties, but CBO estimates that this provision would have little or no budgetary impact.

Estimated impact on State, local, and tribal governments: S. 1618 contains no intergovernmental mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimated impact on the private sector: S. 1618 would impose new private-sector mandates, as defined by UMRA, on telephone carriers and resellers. The most significant burden would fall on those carriers and resellers when they process a customer's request to change providers. CBO estimates that the annual direct costs of complying with private-sector mandates in the bill would probably not exceed the statutory threshold ($100 million in 1996, adjusted annually for inflation).

Current regulations specify the verification process required for any change in a subscriber's choice of provider of telephone toll service (long-distance) generated by telemarketing. S. 1618 would expand the current verification procedures, and extend those procedures to include providers of telephone exchange (local) service and customer-initiated changes. The bill would also require that the carrier or reseller respond in writing to unresolved complaints within a prescribed time. Although the verification process could lead to substantial aggregate costs because it would apply to providers of both local and long-distance service and to both telemarketing and customer-initiated changes, it is unlikely that the incremental costs attributable to the new mandate would reach the statutory threshold for private-sector mandates. In response to a FCC Notice of Proposed Rulemaking released on July 15, 1997, implementing provisions in the Telecommunications Act of 1996 concerning unauthorized changes of consumers' long-distance carriers, three major telephone carriers claimed that the cost of requiring verification of customer-initiated changes would total nearly $60 million annually. Information provided by the FCC, however, suggests that those costs represented total costs and not the incremental costs of the proposed rule. Similarly, CBO has concluded the incremental costs of other requirements relating to verification—responding to complaints and adding local service providers—would be relatively small.

Estimate prepared by: Federal costs: Kim Cawley, revenues: Alyssa Trzeszkowski, and impact on the private sector: Jean Wooster.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

This legislation establishes expedited procedures for resolution of slamming complaints and authorizes the FCC to impose additional penalties against telecommunications carriers found guilty of slamming. It will have no effect on the number of individuals regulated.

ECONOMIC IMPACT

This legislation authorizes the FCC to impose additional penalties on telecommunications carriers for slamming. However, it is expected to have little economic impact.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals affected.

PAPERWORK

This bill requires the FCC to resolve slamming complaints within 150 days. However, it is expected to reduce the number of slamming complaints that the FCC will receive. Therefore, any additional paperwork requirements associated with this bill should be minimal.

SECTION-BY-SECTION ANALYSIS

Section 1. Improved protection for consumers

Section 1(a) establishes minimum verification requirements for submitting or executing a change in a subscriber's provider of telephone exchange service or telephone toll service. This section requires telecommunications carriers to have the subscriber: acknowledge the type of service to be changed; affirm the subscriber's intent to select the provider; affirm that the subscriber is authorized to select the provider for the telephone number in question; acknowledge that the selection of the provider will result in a change in the provider of that service; and provide such other information as the Commission considers appropriate for protection of the subscriber.

A Committee amendment to S. 1618 provides that resellers, not the underlying telecommunications carriers, are liable for the resellers' slamming violations. Resellers therefore must comply with the verification requirements outlined in section 1(a). They are also liable for the damages and penalties described in section 1(b). This change will ensure that resellers are held responsible for their own slamming activities.

Wherever it appears in the bill, the phrase "carrier" is intended to refer to all telecommunications carriers including, but not limited to, resellers. The use of the phrase "carrier or reseller" does not in any way suggest that a reseller is not a carrier or is otherwise distinguishable from a carrier under the Communications Act of 1934 as amended by the Telecommunications Act of 1996.

Another amendment would change the verification procedures in the original bill by eliminating a provision that required a consumer agreeing to a carrier change to acknowledge that he is the subscriber and by adding language that would only require a person to affirm that he is the subscriber or is otherwise authorized to make the change. Many times spouses or parents are authorized to switch carriers, but their names are not on the billing statements. This provision would provide more flexibility for both consumers and carriers in making carrier changes.

Another amendment also provides that the verification procedures that apply to changes in carrier selection will also apply when consumers establish service for the first time. Consumers are exposed to the risk of being slammed when they make their initial carrier selection as well as when they switch their carrier.

Section 1(a) establishes that additional requirements prescribed by the Commission shall preclude the use of negative option marketing; provide for verification of a change in the telephone exchange service or the telephone toll service provider in oral, written, or electronic form; and require the retention of such verification for such time that the Commission considers appropriate. These procedures are expected to help the Commission and other relevant parties to determine whether a slamming incident has taken place. Evidence of an authorized switch or the absence of such evidence can resolve the issue of whether or not consent was given to switch carriers.

Under section 1(a), state commissions are not precluded from enforcing the procedures provided in this bill with respect to the provision of intrastate services.

This Act does not apply to providers of commercial mobile services, as that term is defined in section 332(d)(1) of the Communications Act of 1934. The Committee intends to exempt such providers from section 258 of the Communications Act because, within the commercial mobile service industry, the number of slamming complaints has been negligible.

Section 1(b) provides that when there is a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service, the telecommunications carrier selected shall notify the subscriber of the change, in writing, not more than 15 days after the change is made. The Committee's amendment to section 1(b) provides that the 15-day period that carriers have to notify subscribers of their carrier change would begin running after the change is processed by the long distance carrier after dealing with the subscriber rather than after the change is executed by the local exchange carrier after the local exchange carrier receives notice of the change by the long distance carrier. This approach recognizes that long distance carriers are often unaware of when the change is actually executed by the local company.

In addition, with the amendment, carriers will only have to notify subscribers that they may request information regarding when the carrier change was made and the name of the person who made the change. In the original version of the bill, carriers were required to provide this information automatically.

Section 1(b) requires the Commission to prescribe a period of time, not exceeding 120 days, for a telecommunications carrier to resolve a complaint by a subscriber concerning an unauthorized change in the subscriber's selection of a provider of telephone exchange service or telephone toll service. The amendment adopted by the Committee provides that the period of time to resolve the complaint will begin running after the carrier receives notice of the complaint.

If a carrier fails to resolve a complaint within the time period prescribed by the Commission, then, within 10 days after the end of that period, the carrier must notify the subscriber in writing of the subscriber's right to file a complaint with the Commission concerning the unresolved complaint, the subscriber's other rights under this section, and the other remedies available to the subscriber concerning unauthorized changes. The carrier also must inform the subscriber in writing of the procedures prescribed by the Commission for filing a complaint and provide the subscriber a copy of any evidence in the carrier's possession showing that the change in the subscriber's provider was submitted or executed in accordance with the verification procedures prescribed by the bill as reported. Failure to comply with these requirements amounts to a violation of section 1(a).

Section 1(b) also requires the Commission to establish a simplified process for resolving complaints that does not increase the expense, formality, and time involved in the process. The bill requires the Commission to issue an order resolving a complaint no later than 150 days after the date on which it received the complaint, with respect to violations of the law, and 90 days after it resolves a complaint, with respect to penalties and damages issues.

When a violation is found, the Commission may award damages equal to the greater of $500 or the amount of actual damages. The Commission may, at its discretion, award treble damages. This provision anticipates that the Commission will award damages where there is fault on the part of the carrier and will use discretion to not award or mitigate damages in cases, for example, where the complaint was a result of customer confusion, carrier error, or an unauthorized change by a carrier's unaffiliated reseller (in which case the reseller, but not the underlying carrier, may be liable for damages), an error by the local exchange carrier or interexchange carrier in keying in a change, or some other error. Likewise, the Commission may consider these, and any other mitigating circumstances, when determining whether to impose treble damages under this section.

This bill gives a considerable amount of discretion to the Commission and to the courts in determining fault and imposing penalties and damages on carriers who make unauthorized changes of telephone service providers. Discretion is critical because it allows the Commission and the courts to focus on punishing fraudulent carriers who seek to profit from changing a consumer's telephone provider without permission, while dispensing with complaints that have been brought in error or are unfounded. Section 1(b) of the bill provides that, unless there are mitigating circumstances, a violation of the verification procedures is punishable by a fine of not less than $40,000 for the first offense, and not less than $150,000 for each subsequent offense. The consideration of circumstances mitigating an apparent violation of the Commission's rules is a customary practice by the FCC in assessing fines and other penalties. For purposes of assessing fines under this statute, mitigating circumstances may include instances in which an unauthorized change is made by a carrier's unaffiliated reseller, a complaint is served in error, a complaint is caused by a local exchange carrier or interexchange carrier's unintentional error in keying in a change or by unintended customer confusion (e.g., where one individual in a household or office authorizes a change but fails to communicate this to anyone else), or in which a simple billing error is misperceived as slamming. Because the penalties authorized under this section of the bill are severe, the Commission should use its discretion to punish wrongful behavior and should not misapply the penalties in cases where a slamming complaint turns out to be the result of circumstances such as those listed here.

Likewise, the above situations, and any similar circumstances, may be considered by a court when determining whether to award $500 or actual damages or treble damages under section 1(c) of the bill.

The bill gives the Commission authority to take action on its own behalf to collect any fines it imposes under this section, and on behalf of any subscriber, to collect any damages awarded to the subscriber. This provision empowers the Commission to prosecute slammers who refuse to pay fines or damages. The Commission no longer has to go through the Department of Justice to collect the fines or damages it levies.

Section 1(c) provides that whenever a state has reason to believe that a carrier has engaged in a pattern or practice of changing telephone exchange service or telephone toll service providers without authority from subscribers in that state in violation of this section, the state may bring a civil action on behalf of its residents to enjoin such unauthorized changes, an action to recover for actual monetary loss or $500 in damages for each violation, or both such actions. If the court finds willful or knowing action on the part of carriers to violate this legislation, the court may increase the award to an amount equal to not more than treble the amount available above.

The district courts of the United States have exclusive jurisdiction over all civil actions brought under this section. Such courts also have jurisdiction, upon proper application, to issue writs of mandamus, or similar orders, directing the defendant to comply with section 258 of the Communications Act. The bill also stipulates that courts have the authority to grant a permanent or temporary injunction or restraining order upon a proper showing.

Section 1(c) requires a state to serve prior written notice of any civil action upon the Commission and provide the Commission with a copy of its complaint. The Commission has the right to intervene in the action; upon so intervening, to be heard on all matters arising therein; and to file petitions for appeal.

Any civil action brought under this section may be brought in the U.S. district court where the defendant is found or is an inhabitant or transacts business, or where the violation occurred. The bill establishes that nothing in section 258 of the Communications Act prevents the attorney general of a state from exercising the power to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence. Moreover, nothing in this bill prohibits an authorized state official from proceeding in state court on the basis of an alleged violation of any general civil or criminal statute of such state.

When the Commission has instituted a civil action for violation of regulations prescribed under this section, no state may, during the pendency of such action, institute a civil action against the same defendant named in the complaint before the Commission for the same violations alleged in the complaint before the Commission. However, the state may institute a civil action against the same defendant for a violation different from that alleged in the complaint before the Commission.

Section 1(c) defines the term “attorney general” as the chief legal officer of a state.

Section 1(c) states that nothing in section 258 of the Communications Act shall preempt any state law that imposes more restrictive intrastate requirements regarding changes in a subscriber’s selection of a provider of telephone exchange service or telephone toll service.

Section 1(d) of the bill requires the Commission to submit a report to Congress no later than October 31, 1998, on unauthorized changes of subscribers’ providers of telephone exchange service or telephone toll service. The report must include a list of the 10 carriers that, during the one-year period ending on the date of the report, were subject to the highest number of slamming complaints when compared with the total number of subscribers served by such carriers. The report also must identify the carriers, if any, assessed fines under section 1(c) of this bill, during the one-year period, including the amount of each fine and whether the fine assessed was as a result of a court judgment, a Commission order, or a consent decree.

The purpose of the Commission's report to Congress under section 1(d) is to inform Congress of the most egregious violators of Section 258 of the Communications Act. To fulfill this goal, the Commission should focus on reporting complaints that reflect wrongdoing on the part of a carrier. To that end, the Commission, in preparing its reports to Congress, should verify the identity of the alleged slammers in the consumers' complaints and use those verified complaints as the basis for its final report citing the 10 carriers that have been the object of the highest number of complaints. Complaints that have been fully investigated, found to have merit, and attributed to the actual wrongdoer will provide Congress factual information on those carriers who slam consumers.

For purposes of this section, instances in which it would be an error to attribute a complaint to the carrier to which it was originally addressed are generally the same as those enumerated above that the FCC should consider in mitigation of apparent liability for forfeiture.

Section 2. Report on telemarketing practices

Section 2 requires the FCC to issue a report within 180 days after enactment of this bill on the telemarketing practices used by carriers or their agents or employees for the purpose of soliciting carrier changes by subscribers. As part of the report, the Commission must include findings on the extent to which imposing penalties on telemarketers would deter slamming; the need for rules requiring third-party verification of changes in a subscriber's selection of a provider; and whether wireless carriers should continue to be exempt from the verification and retention requirements.

If the Commission determines that particular telemarketing practices are being used with the intention to mislead, deceive, or confuse subscribers, then the Commission must initiate a rulemaking to prohibit the use of such practices within 120 days after the completion of its report.

CHANGES IN EXISTING LAW

In the opinion of the Committee, it is necessary to dispense with the requirements of paragraph 12 of Rule XXVI of the Standing Rules of the Senate in order to expedite the business of the Senate.

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